No. 73-1245

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

RICHARD V. BISCEGLIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States and B. L. Brutscher, a Special Agent of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the district court (Appendix A, *infra*, pp. 1a-5a) is unofficially reported at 72-1 U.S.T.C. par. 9474. The opinion of the court of appeals (Appendix B, *infra*, pp. 6a-22a) is reported at 486 F.2d 706.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*, pp. 23a-24a) was entered on October 18, 1973. A timely petition for rehearing was denied on

November 16, 1973 (Appendix D, *infra*, p. 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service has statutory authority to issue a summons in order to discover the identity of a person who may be liable for unpaid taxes.

STATUTES INVOLVED

Sections 7601 and 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7601 and 7602, in pertinent part provide:

> Section 7601(a). The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax * * *.
>
> Section 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * *.

STATEMENT

This case arises from the issuance of an internal revenue summons in the course of an investigation

into unusual currency transactions which suggested the possibility of an unpaid tax liability. The currency transactions involved the Commercial Bank of Middlesboro, Kentucky, of which respondent is the Vice-President.

In November 1970, the Commercial Bank had deposited $40,000 in badly deteriorated one hundred dollar bills with the Cincinnati Branch of the Federal Reserve Bank of Cleveland. The bills were "tissue paper thin" (Appendix B, *infra*, p. 7a), a condition apparently caused by a long period of storage, and they were no longer fit for circulation. In accordance with regular Federal Reserve procedures (31 C.F.R. (1972 ed.) 102), the Cincinnati Branch reported the receipt of these bills to the Internal Revenue Service.

Transactions involving large amounts of cash in high-denomination bills are unusual, and it is especially unusual for such bills to be badly worn. Thus the deposit made by the Commercial Bank was considerably out of the ordinary and suggested that substantial transactions may have taken place outside normal financial channels. This in turn suggested that the receipt of the bills, either by the Commercial Bank's depositor or by the Commercial Bank itself, may not have been properly reported for federal tax purposes.[1]

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[1] For example, the $40,000 could represent an amount hoarded by a decedent and not reported by his estate, or an amount illicitly received and not reported as income.

In order to determine whether any unpaid tax liability was associated with the currency deposited by the Commercial Bank, the Service initiated an investigation and issued a summons requesting respondent to testify and bring with him books and records which would provide information as to the person or persons who had deposited or otherwise transferred the bills to the Commercial Bank. The summons was issued "[i]n the matter of the tax liability of John Doe" because the identity of the potential taxpayer subject to investigation was of course unknown.

Respondent refused to testify or to produce the requested information, and the government filed a petition in the United States District Court for the Eastern District of Kentucky for enforcement of the summons. The district court modified the summons to limit the number and kind of records respondent would be required to produce, and ordered the summons enforced as modified.

The court of appeals reversed. The court held that Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, which empowers the Service to issue summonses, "presupposes that the IRS has already identified the person in whom it is interested as a taxpayer before proceeding" (Appendix B, *infra*, p. 15a), and therefore that the Service has no statutory authority to issue a summons before it has discovered the identity of the particular person whose transactions it wishes to investigate.[2]

[2] Since it based the decision on statutory grounds, the court of appeals did not reach respondent's alternative contention that the summons constituted an unreasonable search in violation of the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

The court of appeals wrongly decided an issue of major importance to the conduct of federal tax investigations, and its decision conflicts with those of several other courts of appeals.

1. The court of appeals' confinement of the Secretary's summons power to cases where there has been prior identification of a particular taxpayer has no basis in either the statutory text or in tax enforcement policy.

Section 7602 of the Code empowers the Secretary to issue summonses for the broad purposes "of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability." Nothing in the statute requires the narrow reading given it by the court below. To the contrary, the summons power is broadly phrased, in a manner designed to encourage liberal construction. The blanket references to "any return," "any person," and "any such liability" strongly suggest that the Secretary's authority is not conditioned upon prior identification of a particular "return," "person," or "liability." Furthermore, "making a return where none has been made" may frequently entail investigation of transactions involving persons who, by virtue of the fact that they have failed to file a return, are unknown to the Service at

the time the investigation is begun. The court of appeals' constrictive interpretation thus frustrates one of the specific purposes explicitly set forth in the statute.

The decision below is also more broadly inconsistent with the underlying statutory scheme. Section 7602 should be read as empowering the Secretary to discharge fully his affirmative and wide-ranging duty, imposed by Section 7601, to canvass "each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax." See *Donaldson* v. *United States*, 400 U.S. 517, 523. The summons in this case was issued in furtherance of a legitimate investigation undertaken pursuant to Section 7601. In refusing enforcement on the ground that a particular taxpayer had not yet been identified, the court below placed an artificial restriction, found nowhere in the statute, on the Secretary's ability to carry out his statutory enforcement responsibilities. Indeed, it is difficult to understand how the court expects the Secretary to ascertain the identity of the taxpayer in situations such as the one presented here, if his broad investigatory tool—the internal revenue summons—is not available for that purpose.

Moreover, no useful purpose would be served by limiting the summons power to situations where the taxpayer has already been identified. Throughout its opinion, the court below indirectly evinced concern that enforcement of "John Doe" summonses might open the way to fishing expeditions or dragnet in-

vestigations.[3] But this Court in *Donaldson* v. *United States*, *supra*, *United States* v. *Powell*, 379 U.S. 48, and *Reisman* v. *Caplin*, 375 U.S. 440, has set forth rules which furnish ample protection against such abuses. No further valid interest is protected by treating "John Doe" summonses as abusive *per se*.

2. These considerations have led other courts of appeals to uphold enforcement of the type of summons issued here. See *Tillotson* v. *Boughner*, 333 F. 2d 515 (C.A. 7); *United States* v. *Theodore*, 479 F. 2d 749 (C.A. 4); *United States* v. *Turner*, 480 F. 2d 272 (C.A. 7); *United States* v. *Berkowitz*, C.A. 3, No. 73-1360, decided December 10, 1973; *United States* v. *Carter*, C.A. 5, No. 73-1414, decided December 26, 1973.[4]

The *Tillotson* case involved a summons requesting a lawyer to testify concerning the identity of the client

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[3] Thus the court principally relied upon decisions refusing enforcement of summonses on the grounds of materiality (*McDonough* v. *Lambert*, 94 F. 2d 838 (C.A. 1)) or overbreadth (*Local 174* v. *United States*, 240 F. 2d 387 (C.A. 9), and *First National Bank of Mobile* v. *United States*, 160 F. 2d 532 (C.A. 5)). Those decisions are irrelevant to the question of statutory authority raised here.

[4] Another panel of the Fifth Circuit has affirmed a district court's refusal to enforce a summons issued in connection with an investigation into the liability of an unidentified person, on the ground that such an investigation constitutes nothing more than a "research project." *United States* v. *Humble Oil & Refining Co.*, No. 72-3029, decided January 18, 1974. Since this decision appears to conflict in principle with *Carter*, the government intends to file a petition for rehearing with suggestion of rehearing *en banc* in order to give the Fifth Circuit an opportunity to resolve this internal conflict.

or clients on whose behalf he had made an anonymous payment to the Internal Revenue Service. In upholding enforcement of the summons, the Seventh Circuit expressly rejected (333 F. 2d at 516) the argument "that only an investigation of a taxpayer whose identity is known is authorized." The court below purported to distinguish *Tillotson* on the ground that the summons in that case was issued to assist in determining a specific taxpayer's liability whereas the summons here requests "examination of bank records pertaining to the affairs of a class of persons when no particular, specific taxpayer was under investigation" (Appendix B, *infra*, p. 22a). We do not understand what the court intended by that distinction. In both *Tillotson* and the instant case, the identity of the person subject to investigation was unknown; and the person whose identity is being sought here—the transferor of the one hundred dollar bills—is no less "specific" than the unidentified client in *Tillotson*. The court's distinction of *Tillotson* is thus factually unpersuasive and cannot in any event be squared with the court's broad declaration that Section 7602 "presupposes that the IRS has already identified the person in whom it is interested" (Appendix B, *infra*, p. 15a).

The other "John Doe" summons cases—*Theodore*, *Turner*, *Berkowitz*, and *Carter*—involve enforcement of summonses issued to tax preparers seeking the identities of, and other information concerning, the preparer's clients. The court below made no attempt

to distinguish this line of cases.[5] Although these cases are of course factually distinguishable from *Tillotson* and the instant case, like *Tillotson* they stand for the general principle, rejected by the court below, that the Service has statutory authority to issue a summons in order to discover the identity of a person who may be liable for unpaid taxes.

3. The issue raised here is of great importance to the effective administration of the internal revenue laws. The Service has a duty to see that all federal taxes due are reported and paid, and in carrying out this responsibility it commonly investigates transactions which suggest the possible existence of an unreported tax liability. Such investigations are a legitimate and necessary supplement to the routine examination of returns, and they frequently must proceed without a prior determination of the identity of the person or persons who may be liable for additional taxes. Indeed, that identity is often most easily ascertained through use of the summons power.

In many ways the instant case is typical of such investigations. For years the Service has investigated suspicious currency transactions reported by the Federal Reserve. For example, during the two-year period 1957-1958, the Service completed 129 fraud investigations, resulting in the assessment of

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[5] The court discussed only *Theodore*, which it apparently read as refusing to enforce a "John Doe" summons. The court in *Theodore* did hold that the scope of the summons there was too broad, but it further held that the Service was entitled to production of a list of the preparer's clients' names and Social Security numbers (479 F. 2d at 755).

$13,500,000 in taxes and penalties, which were initiated on the basis of Federal Reserve reports. Treas. Release No. A-590, 1959 CCH Stand. Fed. Tax Rep., par. 6598 (August 3, 1959).[6] Such investigations frequently involve the issuance of "John Doe" summonses.

Tax preparers are currently the focus of another nationwide enforcement effort which commonly entails the issuance of "John Doe" summonses. This effort has of course given rise to the *Theodore-Turner-Berkowitz-Carter* line of cases. The Service is now conducting several other investigatory programs of similar scope. The decision below jeopardizes these special enforcement programs and will also adversely affect many ordinary investigations into suspected tax abuse.

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[6] In recognition that such reports serve the purpose of "provid[ing] law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime" (S. Rep. No. 91-1139, 91st Cong., 2d Sess. 1), Congress enacted the long-standing Federal Reserve reporting requirements (31 C.F.R. (1972 ed.) 102) as Section 231 of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 1101. See *Shultz* v. *California Bankers' Association*, No. 72-1073, argued January 16, 1974.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LONDON

No. 1996

[Filed Jun. 1, 1972]

UNITED STATES OF AMERICA and B. L. BRUTSCHER,
Special Agent, Internal Revenue Service,
PETITIONER

vs

RICHARD V. BISCEGLIA, as Vice President of the
Commercial Bank, Middlesboro, Kentucky,
RESPONDENT

MEMORANDUM OPINION

* * * *

This is an action brought pursuant to the provisions of 26 U.S.C. § 7604 for the enforcement of an Internal Revenue summons issued under the provisions of 26 U.S.C. § 7602. The summons in question was issued by petitioner Brutscher and directs the respondent to appear before him and to produce for inspection:

> "Those books and records which will provide information as to the person(s) or firm(s) which deposited, redeamed [*sic*] or otherwise gave to the Commercial Bank $100 bills U. S. Currency which the Commercial Bank sent in two shipments of (200) two hundred each $100 bills to

the Cincinnati Branch of the Federal Reserve Bank on or about November 6, 1970 and November 16, 1970."

The respondent declined to comply with the summons and this action followed. The parties have filed memoranda directed to their respective legal contentions and have offered proof, at an evidentiary hearing, concerning their respective factual contentions.

The government is basically contending that the Commercial Bank transmitted, on November 6, 1970, and again on November 16, 1970, shipments of currency, each containing the sum of $20,000.00 in badly deteriorated one hundred dollar bills, to the Cincinnati Branch of the Federal Reserve Bank; that these transactions did not represent ordinary banking activities of the Commercial Bank; that enforcement of the subject summons is necessary to enable petitioner Brutscher to determine what taxes, if any, may be owing the Internal Revenue Service on the currency involved in the aforesaid transactions; and that the Commercial Bank has no standing to question the legality of the subject summons. The bank, on the other hand, is contending that it has standing to question the legality of the summons; that the summons is overly broad and is unreasonable under the circumstances; and that the summons represents an improper effort to gather evidence in a criminal investigation.

In *Reisman* v. *Caplin*, 375 U.S. 440 (1964), the court, speaking of proceedings under 26 U.S.C. § 7604, stated at page 449:

"Furthermore, we hold that in any of these procedures either before the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground."

Following that rule, the court in *United States* v. *Michigan Bell Telephone Company*, 415 F.2d 1284 (6th Cir. 1969), recognized the right of a witness other than the taxpayer whose activities were under investigation to challenge the lawfulness of an Internal Revenue summons. Thus, it seems clear that the Commercial Bank has standing to question the lawfulness of the subject summons.

In *United States* v. *Michigan Bell Telephone Company, supra*, the court recognized, however, that an Internal Revenue summons may be utilized as a part of an investigation having both civil and criminal overtones, even if the principal purpose of the summons is to investigate for criminal liability. Hence, it appears that the respondents contention in this regard is without merit.

Granting the propriety of the use of an administrative summons as a part of the instant investigation, the Court must nevertheless resolve the questions inherent as to the permissible limits of such a summons directed to the Commercial Bank or its officers. As further noted by the court in *United States* v. *Michigan Bell Telephone Company, supra*, an Internal Revenue summons will not be enforced where to do so would abuse the process of the court. Similarly, the Government is not entitled to go through the records of a banking institution as a

fishing expedition, and an administrative summons must, therefore, identify with some precision the documents to be produced thereunder. *United States* v. *Dauphin Deposit Trust Company*, 385 F.2d 129 (3rd Cir. 1967), cert. denied, 390 U.S. 921. The Government must also show a genuine nexus between the material sought and the matter under investigation, and the courts will not require a third party to reveal the affairs of one other than the taxpayer under investigation except upon the showing of a relationship between said affairs and the affairs of the involved taxpayer. *First National Bank of Mobile* v. *United States*, 160 F.2d 532 (5th Cir. 1947); *United States* v. *Harrington*, 388 F.2d 520 (2nd Cir. 1968). Finally, the burden to be imposed by an administrative summons upon a witness other than a taxpayer must be commensurate with the investigation at hand, and the courts will not enforce a summons which would result in unwarranted hardship on the witness. *United States* v. *First National Bank of Fort Smith, Arkansas*, 173 F.Supp. 716 (W. D. Ark. 1959).

Summarizing the foregoing principles in terms of the instant case, enforcement of the subject summons is proper to the extent of requiring the bank to produce those records which may be reasonably expected to relate to the investigation at hand, in a manner least burdensome to the bank and least calculated to unnecessarily reveal the affairs of the bank's customers whose transactions are not related to said investigation. At the hearing held in connection with

this matter, the respondent testified that if the bank received the subject currency in a cash for cash exchange, there would be no record of the transaction. He further testified that if the bank took the subject currency as a deposit, the transaction would be reflected by a cash ticket, which would indicate the teller but not the depositor, and by a deposit ticket, which would indicate both the teller who took the deposit and the person or persons making the deposit.

In the opinion of the Court, the legitimate ends of the subject summons could be reasonably served by requiring the bank to produce copies of, or to produce for copying, those of its deposit tickets reflecting cash deposits in the amount of $20,000.00 during the period from October 16, 1970, through November 16, 1970, plus those of its deposit tickets reflecting (if such information is revealed by the tickets) cash deposits involving one hundred dollar bills totaling amounts equal to or in excess of $5,000.00 per deposit for a like period. Accordingly, an Order will be this day entered directing the respondent to make such production within 30 days. To that extent the petition for enforcement will be granted and said petition will be otherwise denied.

The Court feels compelled to observe that this matter could be obviated by an interrogation, under oath, of the bank's various officers and tellers.

This 1st day of June, 1972.

/s/ Bernard T. Moynahan, Jr.
BERNARD T. MOYNAHAN, JR.
Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1783

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank, Middlesboro, Kentucky,
RESPONDENT-APPELLANT

v.

UNITED STATES OF AMERICA and B. L. BRUTSCHER, Special Agent, Internal Revenue Service,
PETITIONERS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed October 18, 1973

Before: MCCREE and LIVELY, Circuit Judges, and KENNEDY,* District Judge.

MCCREE, Circuit Judge. This appeal requires us to determine whether the Internal Revenue Service may use a civil summons to compel a third party to produce for examination records pertaining to the financial affairs of unspecified and unidentified persons and organizations for the purpose of ascertaining their identities. We hold that it may not.

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* The Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, sitting by designation.

The facts of the case are not disputed. On November 6, 1970, and on November 16, 1970, the Cincinnati branch of the Federal Reserve Bank of Cleveland received deposits of currency from the Commercial Bank of Middlesboro, Kentucky. Each deposit included $20,000 in one-hundred dollar bills which were "tissue paper thin" and in such a badly deteriorated condition that they were no longer fit for circulation. (Appendix at 22) Accordingly, the Cincinnati Branch of the Federal Reserve Bank destroyed them.

Apparently pursuant to federal reporting requirements,[1] the Cincinnati branch of the Federal Reserve

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[1] In their briefs, both parties refer to a Form TCR-1 a copy of which was filed by the Cincinnati branch of the Federal Reserve Bank with the IRS. This form, found on page 20 of the Appendix, and entitled "Report of Currency Transaction" requires three primary kinds of information: (1) the name, address, and business, occupation or profession of the person or organization initiating the transactions reported; (2) a description of the transactions reported, that is, the total amount of the currency involved, the amount of denominations of $100 or higher, and whether the transaction was a deposit, withdrawal, or exchange of currency, or the cashing or purchasing of a check; and (3) the name and address of the financial institution reporting. The obligation of financial institutions to provide this information is imposed by 31 C.F.R. §§ 102.1-4. (1972) (Instructions Relating to Reports of Currency Transactions). This regulation provides:

> § 102.1 Reports of currency transactions required.
>
> Commencing with transactions occurring in the month of August 1959, every financial institution in the United States shall file monthly reports on Form TCR-1 concerning each deposit or withdrawal, or other payment or transfer, effected by, through, or to such financial

Bank reported these deposits to the Internal Revenue Service (IRS). The report informed the IRS of the "deteriorated condition" of the bills "apparently [resulting] from [a] long period of storage." [2]

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institution, which involves transactions in United States currency as follows:

(a) Transactions involving $2,500 or more of United States currency in denominations of $100 or higher;

(b) Transactions involving $10,000 or more of United States currency in any denominations, and

(c) Transactions involving any amount in any denominations,

which in the judgment of the financial institution exceed those commensurate with the customary conduct of the business, industry or profession of the person or organization concerned.

§ 102.2 Filing of reports.

Reports on Form TCR-1 shall be filed on or before the 15th day of the month following that in which the reported transactions occur, with the Federal Reserve Bank of the district in which the reporting financial institution is located. All information called for in such form shall be furnished. A supply of Form TRC-1 may be obtained upon request directed to any Federal Reserve Bank.

§ 102.3 Identification required.

No financial institution shall effect any transaction with respect to which a report is required unless the person or organizations with whom such transaction is to be effected has been satisfactorily identified.

§ 102.4 Definitions.

As used in this part "payment or transfer" shall include exchange of currency; and "financial institutions" shall mean banks, trust companies, savings banks, private bankers, investment bankers, building and loan associations, securities and commodities brokers, and currency exchanges and other persons or organizations engaged primarily in cashing and exchanging currency.

It appears that this regulation did not require the Cincinnati branch of the Federal Reserve Bank to file the Form TCR-1 exhibited in the Appendix. It does appear, however, that this regulation required the Commercial Bank in this case to file a Form TCR-1 in which, of course, the information sought by the IRS in this proceeding would have been disclosed.

It should also be noted that after the events that are the subject of this litigation had transpired, the Currency and Foreign Transactions Reporting Act of 1970, 31 U.S.C. §§ 1051 et seq. (Supp. 1973), became effective. This Act requires similar disclosures by financial institutions. A part of this Act and a regulation promulgated thereunder requiring domestic financial institutions to report any currency transaction with any customer involving more than $10,000 has been declared unconstitutional. *Stark* v. *Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972) (appeal pending).

[2] At the hearing before the United States District Court, the employee of the Federal Reserve Bank who had noticed the deteriorated condition of the bills deposited by the Commercial Bank testified that to the best of his knowledge, "there was only one parallel situation and that was several years ago where a large hoard of money was found that was in comparable condition. It was stored in milk cans that were buried in concrete."

The Intelligence Division of the IRS, suspecting that this money may not have been properly reported for income tax purposes by the person or persons who had transferred it to the Commercial Bank, assigned Special Agent B. L. Brutscher to investigate possible criminal violations of the tax laws. During his investigation, Brutscher, allegedly pursuant to

section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1967),[3] caused a summons, "In the matter

[3] 26 U.S.C. § 7602 (1967), "Examination of books and witnesses," provides:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

The IRS has also argued on appeal that 26 U.S.C. § 7601 (1967) authorizes the issuance and the enforcement of its summons in this case. That section provides:

> Canvass of districts for taxable persons and objects
>
> (a) General rule.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

of the tax liability of John Doe," served on Richard V. Bisceglia, vice president of the Commercial Bank, requesting that he testify and bring with him

> [t]hose books and records which will provide information as to the person(s) or firm(s) which deposited, redeemed or otherwise gave to the Commercial Bank $100 bills U. S. Currency which the Commercial Bank sent in two shipments of (200) two hundred each $100 bills to the Cincinnati Branch of the Federal Reserve Bank on or about November 6, 1970 and November 15, 1970.

When Bisceglia refused to comply with the summons, Special Agent Brutscher, pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code, 26 U.S.C. §§ 7402(b), 7604(a) (1967),[4] filed a peti-

Section 7601, however, merely "flatly imposes upon the Secretary the duty to canvass and inquire." *Donaldson* v. *United States*, 400 U.S. 517, 523 (1971). Accordingly, we do not believe that Congress intended to provide in this section grounds additional to those specified in section 7602 for the issuance of a summons.

[4] 26 U.S.C. § 7402(b) (1967), conferring jurisdiction upon the United States District Courts, provides:

> (b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce boks, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by ap-

tion in United States District Court to enforce the summons. At the hearing on the petition, evidence was adduced showing that it was unusual for the Commercial Bank to deposit with the Federal Reserve Bank so large an amount of money of one hundred dollar denominations and so large a number of bills in such a deteriorated condition. Although the IRS thought that there might be tax liability for 1970 because it appeared that someone might have been hoarding money for a considerable period of time in an unusual storage place, the IRS admitted that it neither suspected nor was it investigating a particular person or taxpayer. Instead, the purpose of the summons was to ascertain the identity of that person or those persons who had transferred the deteriorated bills to the Commercial Bank and then to determine whether anyone was liable for income taxes. Bisceglia testified that the bank had both cash and deposit tickets for the period in question. He explained, however, that only deposit tickets disclose the identity of a person making a deposit. Cash tickets show

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propriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. § 7604(a) (1967), relating to the enforcement of summons, provides:

> (a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

only the amount of cash deposited and the identity of the teller who received the deposit. He also informed the court that the bank keeps no records of exchange transactions, that is, transactions in which an individual exchanges his currency for new currency or for currency of different denominations.

In opposition to the enforcement of the summons, Bisceglia urged four affirmative defenses: (1) the summons was neither authorized by section 7602 of the Internal Revenue Code nor was it valid under the Fourth Amendment because it failed to specify the identity of the taxpayer being investigated; (2) a section 7602 civil summons was improper because the dominant purpose of the investigation was criminal; (3) the general nature of the summons made it impossible and impracticable for the bank to notify every taxpayer who had transacted business with the bank during the period of time in question and therefore denied the bank's customers their right to challenge its enforcement; and (4) the IRS had not acted in good faith in issuing the summons.

The district court, on June 1, 1972, rejected Bisceglia's affirmative defenses and ordered the bank to make available to the IRS those records reasonably related to the investigation. To avoid overburdening the bank and unnecessarily disclosing the transactions of bank customers that were not relevant to the IRS inquiry,[5] the court specified the records required as

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[5] At the hearing before the United States District Court, Bisceglia testified that the Commercial Bank processes ap-

those deposit tickets, if any, of the Commercial Bank, Middlesboro, Kentucky, which reflect cash deposits during the period from October 16, 1970, through November 16, 1970, in the amount of $20,000.00, and those deposit tickets, if any, of said bank which reflect cash deposits involving one hundred dollar bills totaling amounts equal to or in excess of $5,000.00 per deposit for a like period.

Bisceglia has appealed from this order the enforcement of which was stayed pending this appeal on July 14, 1972, and contends first, that the summons and subsequent order enforcing the summons are not authorized by section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1967), and second, that they violate the Fourth Amendment's prohibition of unreasonable searches and seizures. Because we find that the summons and the order enforcing the summons are not authorized by the Internal Revenue Code, we do not reach the constitutional question.

In enacting section 7602 of the Internal Revenue Code, Congress specified the purposes for which the Internal Revenue Service is authorized to issue a summons as follows:

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . . 26 U.S.C. § 7602 (1967).

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proximately 1,250 to 1,500 cash tickets and 600 to 700 deposit tickets daily.

In this section, Congress has not authorized the IRS to examine records pertaining to the financial affairs of an indefinite number of unspecified persons for the purpose of ascertaining the identity of one or some of those persons who may be taxpayers and liable for taxes. Instead, the section presupposes that the IRS has already identified the person in whom it is interested as a taxpayer before proceeding. Even the IRS summons form, Treasury Department Form 2039, acknowledges this presupposition because it begins with the words "In the matter of the tax liability of ————————," and informs the recipient of the summons that he is required to appear and give testimony "relating to the tax liability or the collection of the tax liability of the above named person . . . ." In this case, the IRS has inserted the name "John Doe" into the space provided for the name of the taxpayer under investigation, and it admits that the name is fictitious and that no person of that name is under investigation.

Although courts are required to "liberally construe the powers given the governmental agency" by section 7602 of the Internal Revenue Code, here, the district court's sweeping interpretation of this section has gone beyond mere statutory construction. *United States* v. *Giordano*, 419 F.2d 564, 569-70 (5th Cir. 1969), *cert. denied* 397 U.S. 1037 (1970). In the past, whenever the IRS has sought to use its summons power as an exploratory or identifying device to compel the production of records pertaining to a group of otherwise unidentified persons in the hope

of discovering whether persons in this group may be taxpayers or, if so, may be liable for income taxes, courts have moved swiftly to arrest or curtail the attempt. When the IRS seeks to obtain records from persons not themselves under investigation for the purpose of investigating others whose identity is known, courts have been particularly careful to ensure that investigation of the taxpayer and not a sweeping exploratory search is its object.[6]

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[6] In *Local 174* v. *United States*, 240 F.2d 387 (9th Cir. 1956), the IRS, allegedly pursuant to § 7602, issued a summons to a union local to produce any and all of its records for a five year period pertaining to any transaction between the Local and its president, Brewster, his wife and any of their agents. The court, characterizing the summons as a request for "a blanket turnover for an unlimited time," found that the Local, as a third party, was not "required to produce any item or document unless it was (1) in his possesion, (2) relevant to the tax liability of the Brewsters or either of them, or (3) material to the inquiry." *Id.* at 391. The summons was general, not particularized, and therefore unenforceable.

Even when the IRS seeks records held by a taxpayer who is under investigation, its power to examine records is not unlimited. Thus in *In re International Corporation Co.*, 5 F. Supp. 608 (S.D.N.Y. 1934), the court refused to order a taxpayer whose tax liability was under investigation to disclose the names of the foreign corporations that the taxpayer had helped organize because "the particular name of a corporation organized by petitioner would seem to have nothing whatsoever to do with the correctness of the income, or the deductions, reported in its return." *Id.* at 612.

In *McDonough* v. *Lambert*, 94 F.2d 838 (1st Cir. 1958), the court refused to order a taxpayer under investigation to disclose the name of an attorney to whom the taxpayer had allegedly paid $10,000 for legal services because even if that expense were disallowed, the tax liability of the taxpayer (who had sustained a loss of over $100,000 that year) would be unaffected. In refusing to uphold the order enforcing the summons, the court explained:

> We do not think the provisions of this section can be given such a broad construction; that by its terms it is more limited in scope and confined to the procure [sic] of evidence, oral or documentary, bearing upon matters required by law to be included in a given tax return to determine the correct tax liability of the person who made the return or who failed to make one, and was not intended to authorize the procurement of evidence that might be material in verification of the tax return of some other person, not known to the Bureau of Internal Revenue, and who may or may not have made a return. . . . *Id.* at 841.

Thus, in *Mays* v. *Davis*, 7 F. Supp. 596 (W.D. Pa. 1934), decided under the predecessor of section 7602, the court refused to require a trust officer of a trust company to produce for IRS examination all records disclosing the "names and addresses of the beneficiaries of trusts created by will where the widow, a beneficiary, has elected to take under the will . . . where the will provides for payment to her of income of the trust estate; and where income was paid to the widow" and all records showing "the name of each such trust." *Id.* at 596. The court properly characterized this summons as merely exploratory. The IRS, having no identifiable taxpayer under investigation, was seeking information about a group of persons having common characteristics in the hope of discovering some tax liability.

In *First Nat. Bank of Mobile* v. *United States*, 160 F.2d 532 (5th Cir. 1947), the court, also interpreting the predecessor of section 7602, refused to enforce a summons during an IRS investigation of several

named taxpayers, that required a bank "to produce for inspection and examination . . . any and all books, papers and records of whatever nature, *irrespective of whether such records also pertain to similar transactions with other persons or firms* . . . ." *Id.* at 533. (emphasis added). The court, finding that the order exceeded the scope of the statute, struck the italicized part of the order and substituted "which pertain to or reflect the issuance of cashier's checks . . . which bear upon, or have reference to the federal tax liability of the above-named firm and individuals . . ." *Id.* In denying a petition for rehearing, the court added that "[n]either the revenue agent nor the court has authority under the statute to require the product [*sic*] of memoranda, books, etc., of third parties unless they have a bearing upon the return or returns under investigation." *Id.* at 534.

In enacting section 7602 of the Internal Revenue Code, Congress intended to make "no material change [in] existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954); U.S. Code Cong. and Admin. News, 1954, p. 4025 et seq. Accordingly, courts have continued to refuse to sanction IRS "John Doe" summonses issued to third parties for the purpose of examining their records pertaining to the affairs of a particular group of persons when no identifiable taxpayer is under investigation.

In *United States* v. *Humble Oil & Refining Co.*, 346 F. Supp. 944 (S.D. Tex. 1972), the IRS sought from Humble Oil the identities of lessors of mineral

rights to whom the company had surrendered expired mineral leases without having extracted any minerals in order to determine whether these lessors had remembered to restore in their most recent tax returns the depletion allowances which they had claimed during the life of the lease. The IRS, upon admitting that it had neither the oil company nor any particular lessor, lease or land under investigation, was not permitted to use the summons power granted in section 7602 as a tool for research and exploration. The court found that "Congress intended that a person or persons or particular returns be under scrutiny by the IRS before such a summons can be issued." *Id.* at 947.

Similarly, in *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973), the court refused to uphold an order enforcing a summons that required an accounting firm to produce all the income tax returns and any and all related material pertaining to all its clients for a three year period. The summons was issued as part of a nationwide investigation of tax preparation firms to determine whether these firms were fairly computing the tax liabilities of their clients. In the course of the investigation, the IRS became suspicious of the Theodore accounting firm after the firm had prepared an incorrect tax return for one of its agents posing as a customer. The purpose of the summons was to determine whether the firm had made similar incorrect returns for other customers and, if it had, to determine their correct tax liability. The summons, characterized as " 'a

rambling exploration' of a third party's files" was unenforceable because section 7602 "only allows the IRS to summon information relating to the correctness of a particular return or to a particular person and does not authorize the use of open-ended Joe [sic] Doe summonses." *Id.* at 754, 755.

We believe that these cases control the disposition of this appeal. Here, the IRS has requested and the district court has approved a summons directed to a third party, the Middlesboro Commercial Bank to produce for inspection bank records relating to a group of persons who either deposited $20,000 at one time or who made deposits of one hundred dollar bills exceeding $5,000 at one time. The IRS has admitted that it has no particular taxpayer under investigation and that it desires the records solely for the purpose of obtaining the identities of persons and firms who made deposits of the nature described. It does not seek the records "[f]or the purpose of ascertaining the correctness of any return," for the purpose of "making a return where none has been made," for the purpose of "determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or" for the purpose of "collecting any such liability" as required by section 7602 of the Internal Revenue Code. In short, the IRS has not made the demonstration requisite for the enforcement of a summons—that it seeks third party records pertaining to the income tax liability of a particular taxpayer in whom

it is interested. Instead, the IRS has been granted a summons enabling it to inquire into the financial affairs of a group of unspecified persons in the hope of identifying one or more of them as the person or persons who transferred deteriorated bills to the Commercial Bank, a purpose not authorized by section 7602 of the Internal Revenue Code.

We believe, therefore, that *Tillotson* v. *Boughner*, 333 F.2d 515 (7th Cir.), *cert. denied* 379 U.S. 913 (1964) and the related case of *Schultz* v. *Rayunec*, 350 F.2d 666 (7th Cir. 1965), cited by the IkS, are inapposite. In those cases, the court ordered enforced section 7602 summonses issued to a third party bank and an attorney during an investigation in which the IRS sought the identity of the person for whom the attorney had obtained a cashier's check for $215,-499.95 from the bank. The attorney had sent the check to the IRS accompanied by a letter that informed the IRS that the check was for unpaid taxes owed by an anonymous taxpayer. The IRS sought his identity from the attorney, whose claim of attorney-client privilege was upheld in *Tillotson* v. *Boughner*, 350 F.2d 663 (7th Cir. 1965), and from the bank, which was ordered to disclose the identity of the taxpayer whose money had been used to purchase a cashier's check from it. The court, in the earlier *Tillotson* case, was careful to distinguish the *Mays* case, *supra*, on the ground that in *Tillotson* not only did "*a* taxpayer" exist but also that the bank was requested to assist in determining that "specific taxpayer's liability." 333 F.2d at 516. (Emphasis in

opinion). The court did not sanction an examination of bank records pertaining to the affairs of a class of persons when no particular, specific taxpayer was under investigation.

We decline to do by interpretation that which Congress has declined to do by legislation. The IRS is not authorized to issue a summons to a third party to compel production of that party's records except in furtherance of an investigation of the possible tax liability of specified taxpayers.

Reversed and remanded with instructions to deny enforcement of the summons.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1783

[Filed Oct. 18, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA and B. L. BRUTSCHER, Special Agent, Internal Revenue Service,
PETITIONERS-APPELLEES

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank, Middlesboro, Kentucky,
RESPONDENT-APPELLANT

Before: MCCREE, LIVELY, Circuit Judges, and KENNEDY, District Judge

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded

with instructions to deny enforcement of the summons.

It is further ordered that Respondent-Appellant recover from Petitioners-Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1783

[Filed Nov. 16, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

—*vs*—

RICHARD V. BISCEGLIA, RESPONDENT-APPELLANT

BEFORE: McCREE and LIVELY, Circuit Judge, and KENNEDY,* District Judge.

ORDER

The petition for rehearing having come on to be heard, upon consideration, it is ORDERED that it be, and hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

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